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CITATIONS

488116—42——1

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 401

PARTS MANUFACTURING CORP., PETITIONER

v.

THOMAS P. LYNCH, SPECIAL AGENT, FEDERAL BUREAU OF INVESTIGATION; UNITED STATES OF AMERICA; UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions of the circuit court of appeals (R. 86–90) and the district court (R. 71–80) are not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered August 10, 1942 (R. 90). The petition for a writ of certiorari was filed September 15, 1942. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Government's knowledge of the facts stated in affidavits filed in support of an application for a search warrant was acquired independently of a prior illegal search and seizure.

STATEMENT

On April 28, 1942, petitioner filed in the District Court for the Southern District of New York a petition to quash a search warrant issued on April 13, 1942, by Judge Henry W. Goddard of that court, and to suppress the seizure and compel the return by respondents of certain goods, wares, and merchandise which had been seized pursuant to the warrant (R. 5–17). An order to show cause issued (R. 3–5) and a hearing was had before District Judge Murray Hulbert on May 5, 1942 (see R. 1). On June 8, 1942, the petition was denied (R. 82–83), and on appeal the order of denial was affirmed (R. 90).

No request was made for the taking of testimony on the hearing of the petition (R. 71). The pertinent facts are set forth in the petition, supporting affidavits (R. 18–25) and exhibits appended to the petition (R. 26–56), and an affidavit in opposition (R. 56–67). They may be summarized as follows:

On December 19, 1941, Sol Laks and Charles Cohn, president and secretary, respectively, of petitioner, were charged, together with a number of other defendants, in a one-count indictment filed in the District Court for the Eastern District of Mich-

igan with conspiracy to violate the provisions of the National Stolen Property Act of May 22, 1934 (c. 333, 48 Stat. 794–795; 18 U. S. C. 415, 416), in violation of Section 7 of that act as added by the Act of August 3, 1939 (c. 413, sec. 5, 53 Stat. 1179; 18 U. S. C. 418a) (R. 12, 18, 57). Laks and Cohn had previously been arraigned, on or about December 5, 1941, in the Northern District of Illinois and the Southern District of New York, respectively, on complaints seeking their removal to the Eastern District of Michigan in connection with this charge[1] (R. 5, 14–15, 57).

On December 8, 1941, Judge Frank A. Picard of the District Court for the Eastern District of Michigan issued an "Order Impounding Certain Evidence" which designated the Director of the Federal Bureau of Investigation and his duly authorized special agents as officers of that court and directed them to seize and, until further order of the court, retain possession of "all of the genuine Ford, Lincoln-Zephyr, and/or Mercury automobile

[1] The removal complaint against Laks in the Northern District of Illinois was later dismissed and he was arraigned on a like complaint in the Southern District of New York on or about January 15, 1942. This procedure was adopted to suit the convenience of Irving R. Kaufman, attorney for both Laks and Cohn. (R. 57.) A hearing on the removal complaints was had before a United States Commissioner on January 15, 1942, at which time a copy of the indictment which had in the meantime been returned in the Eastern District of Michigan was offered in evidence, but at least as late as May 5, 1942, proceedings on the complaints were still pending (R. 58).

parts now located in and upon certain premises," including, among others, "311 West 66th Street, New York City, New York," at which address petitioner's place of business is located, and "Vaults Numbered 464 and 468 in the Metropolitan Fireproof Warehouse, 475 Amsterdam Avenue, New York City, New York," which were rented in the name of Cohn (R. 26–28). On December 11, 1941, agents of the Federal Bureau of Investigation, pursuant to this order, seized certain property which they found at petitioner's place of business and in the designated vaults and removed it to Detroit, Michigan (R. 6, 22, 59, 63). On December 12 petitioner filed a motion in the District Court for the Southern District of New York for an order compelling the return of this property. The motion was denied on January 13, 1942, and an appeal was noted. (R. 29, 60, 61.) On March 11, 1942, the Circuit Court of Appeals for the Second Circuit, in *Weinberg* v. *United States,* 126 F. (2d) 1004, held that the seizure of certain other property in New York pursuant to Judge Picard's order was illegal on the grounds that he lacked jurisdiction to issue a search warrant for execution outside the Eastern District of Michigan, and that the order did not conform to the requirements of the Fourth Amendment and the search warrant statute (Act of June 15, 1917, c. 30, title XI, §§ 3, 6, 40 Stat. 228, 229; 18 U. S. C. 613, 616). An order of the District Court for the Southern District of New York denying a motion substantially identical with that made

by petitioner was accordingly reversed. (R. 7, 22, 60–61.) In conformance with this decision of the circuit court of appeals, the district court, on March 20, 1942, entered an order directing the return to petitioner, on or before April 2, 1942, of all of the property which had been seized from its premises and the warehouse vaults (R. 29–30).[2]

Pursuant to this order and at the request of the United States Attorney, to whom the order was directed, agents of the Federal Bureau of Investigation appeared at petitioner's premises on April 2, 1942, and began to unload the property from a truck (R. 7–8, 23, 61–62). At the same time a Deputy Sheriff of New York County appeared and served upon petitioner a writ of replevin, together with a bond in the sum of $30,000, in a suit which had been commenced in the Supreme Court of New York by the Ford Motor Company against petitioner (R. 8, 19, 23, 43–44, 62). The writ was based upon an affidavit of Emanuel Goodman (R. 31–33), an attorney for the Ford company, in which he stated that he had been informed by his client that automobile parts and accessories had been stolen from its factory at Dearborn, Michigan; that at the request of his client he had called at the office of the Federal Bureau of Investigation in New York

[2] The United States Attorney for the Southern District of New York did not require petitioner to perfect its appeal from the previous order denying its application for the return of the property (R. 61). The order for the return of the property was entered upon the motion of petitioner and with the consent of the United States Attorney (R. 30).

on March 31, 1942, for further information in regard to the matter, and had been informed by agents of the Bureau that they and their Detroit office had made a thorough investigation of the thefts and had succeeded in tracing some of the stolen parts to the possession of petitioner; and that the agents had furnished him with a list of such parts, which were described in a schedule attached to the affidavit (R. 33–40). "Substantially all" of the property returned to petitioner by the agents on April 2, 1942, was replevied under the writ and stored by the Deputy Sheriff at Centre Storage Warehouses, Inc., in New York City (R. 8, 23, 43–44).

Thereafter, in conformance with the provisions of the New York Civil Practice Act, petitioner commenced proceedings to reclaim the replevied property. It posted a bond in the sum of $30,000 and gave notice of justification of sureties, returnable in the Supreme Court, New York County, on April 13, 1942. No objection being made, the sureties were justified. (R. 8–9, 19–20, 23, 44.) Petitioner, by its attorney, Mr. Kaufman, requested Assistant United States Attorney Edward J. Behrens and Special Agent Thomas P. Lynch of the Federal Bureau of Investigation to be present at Centre Storage Warehouses, Inc. on April 14, 1942, at which time petitioner was to reclaim the replevied property, in order that a count could be made and a determination had as to whether all the property originally seized under Judge Picard's order had

been returned. At the appointed time on April 14 Mr. Lynch and two other special agents were present at the warehouse, together with the Deputy Sheriff and representatives of petitioner and the warehouse company. After it was agreed that petitioner was entitled to receive all the property which had been stored at the warehouse by the Deputy Sheriff, all those present proceeded to lot No. 179–A, the warehouse number of the property in question, when Mr. Lynch served a search warrant (R. 41–42) which had been issued the preceding day by Judge Goddard of the District Court for the Southern District of New York. (R. 9–11.) It is this warrant which petitioner seeks to quash in the instant case.

The warrant had been issued at the request of Assistant United States Attorney Behrens (R. 45–46), and it directed Special Agent Lynch to enter and search the premises of Centre Storage Warehouses, Inc., and to seize "all Ford Motor Company parts (including Ford, Lincoln-Zephyr and Mercury), which are contained in approximately 364 cartons and approximately 27 wooden boxes, which cartons and boxes are identified in the records of the said warehouse by lot #179–A" (R. 41, 42). Attached to and made a part of the warrant were several affidavits (R. 43–56), upon the basis of which Judge Goddard found, as he stated in the warrant, that there was probable cause to believe that the property had been used as a means of com-

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mitting a violation of the National Stolen Property Act (R. 41).

The facts leading up to Mr. Behrens' application for the warrant are as follows: After the Federal Bureau of Investigation returned the property to petitioner on April 2, 1942, Mr. Behrens "dismissed the matter from his mind so far as he was permitted to do so." He had at that time no intention of seeking a search warrant and "was prepared to close the matter in the files." On April 8 or 9, 1942, he first considered the matter of obtaining a search warrant in connection with property suspected of having been stolen from the Ford Motor Company and thereafter transported in interstate commerce. He interrogated witnesses and obtained from them affidavits which satisfied him that stolen property of a value exceeding $5,000 had been shipped in interstate commerce to petitioner and that at the time of such shipments those causing the transportation knew that the property had been stolen. (R. 64–65.) He first learned that the Ford Company had commenced a replevin action involving automobile parts alleged to be owned by petitioner from petitioner's attorney, Mr. Kaufman (R. 62; and see R. 23–24). Acting upon this knowledge, Mr. Behrens ascertained from the Sheriff of New York County where the property involved in the replevin action was located and, on April 11, 1942, with the permission of the Sheriff, he went to Centre Storage Warehouses, Inc., to examine it. This examination satisfied Mr. Behr-

ens that there was probable cause to believe that the property had been used in the commission of a felony. (R. 65.) The property, identified in the warehouse as lot No. 179–A, consisted of a varied assortment of Ford, Lincoln-Zephyr, and Mercury automobile parts contained in approximately 364 cardboard cartons and 27 wooden boxes. On virtually all of the large boxes and cartons were labels or stenciled matter showing that they had originally been shipped to the Ford Motor Company from the manufacturer. Many of the labels contained the Ford order number. It appeared that these labels had at one time been covered over with glued paper. On many of the boxes and cartons an attempt had been made to obliterate the Ford name with crayon or black paint. On none of the boxes that Mr. Behrens saw was there a label directing shipment to petitioner; such labels had all been cut off with a knife or other sharp instrument. Because of the large number of boxes and cartons, Mr. Behrens did not examine all of them, but from what he saw, together with the facts stated in affidavits obtained from the witnesses he had interrogated, he was convinced that the merchandise examined consisted practically exclusively of Ford, Lincoln-Zephyr, and Mercury automobile parts that had been stolen from the Ford company and thereafter shipped in interstate commerce with knowledge on the part of the shippers that they had been stolen. (R. 44–45.)

In support of his application for a search warrant, Mr. Behrens submitted his own affidavit reporting, substantially as outlined above, the results of his examination of the merchandise in the warehouse on April 11, 1942 (R. 43–45). Other affidavits submitted were to the following effect:

Special Agent Norman G. Temple of the Federal Bureau of Investigation stated that he had checked the books and records of the Ford Motor Company for the period January 1 to June 30, 1941, in connection with an investigation of thefts of large numbers of automobile parts. Due to the length of time required to make a complete review of any one part, his review was limited to eleven parts. A total shortage of nearly three million dollars was revealed in only the eleven parts checked. (R. 46–48).

Sol Rimar stated that he was engaged in business in Detroit, Michigan, under the trade name of Motor Supply Company. From some time in 1940 to November 1941 he sold various Ford parts to petitioner, shipping them from Detroit to New York through the trucking firms of Roadway Transit Company, Kramer Brothers, and Universal Carloading Company. He never rendered any bills for the parts and usually called in person at petitioner's office in New York for payment. Many of the cases of parts thus shipped originally had the Ford name on the cartons, but the name would be "pasted over" prior to shipment. All the parts shipped had been stolen from the Ford Motor Com-

pany, and he knew they were stolen when he shipped them. On April 11, 1942, he accompanied Mr. Behrens to Centre Storage Warehouses, Inc., where he examined some of the cartons and boxes in lot No. 179–A. Rimar identified boxes and cartons containing various stolen Ford parts as the boxes in which he had shipped the parts to petitioner. All the boxes which he identified appeared to be in the same condition as to contents as when he shipped them to petitioner. From one of the boxes he took a small piece of paper, which was part of a label he had affixed to the box at the time of shipment and which bore his own handwriting. On some of the boxes the Ford name had been obliterated with black paint; Rimar had used this method of obliteration in shipping some of the stolen parts to petitioner. On a few boxes which he identified as containing stolen Ford parts shipped by him to petitioner, there remained parts of the labels which he had affixed at the time of shipment, though in most instances the labels had been completely cut off. (R. 48–51.)

John Herman and Sol Lewis stated that they were partners, doing business in Detroit under the name of J. & S. Sales Company. For about a year prior to November 1941 they sold various Ford parts to petitioner, shipping them via Kramer Brothers or Erie Freight Lines. Most of the shipments were consigned under the fictitious name of "R. Allen, 11551 Livernois, Detroit, Michigan." The parts had been purchased by them from em-

ployees of the Ford Motor Company, who had obtained them by theft or embezzlement.[3] (R. 52–54.)

The affidavits of Rimar, Herman, and Lewis were corroborated by that of Special Agent Edmond J. Kennedy, who investigated the books and records of the trucking companies used by them in making shipments of Ford parts to petitioner (R. 55–56).

ARGUMENT

Petitioner contends (Pet. 9–10) that the facts stated in the Behrens and Rimar affidavits "were derived from evidence previously illegally seized by Government agents," and hence did not constitute competent proof of probable cause for the issuance of the warrant. The alleged causal connection between the original illegal seizure and the ascertainment of the facts stated in these two affidavits is substantially as follows: Having possession of various automobile parts, which had been taken from petitioner's premises under color of a court order subsequently held invalid, the Federal Bureau of Investigation, before the date set for the return of the property, supplied the attorney for the Ford Motor Company with a list of the parts taken. The Ford attorney, "thus armed,

[3] In a schedule attached to Herman's affidavit he listed the parts sold by the partnership to petitioner, the prices paid by petitioner, and the list price values of the parts. The total purchase price was a little over $20,000 while the total list price value was more than seven times that amount. (R. 53.)

secured the seizure of the property by the New York Deputy Sheriff" in the replevin action. (Pet. 10.) The parts having thus been "placed in friendly hands at the initiative of the Government," Behrens and Rimar were enabled, "by a transparently collusive arrangement," to examine them at the warehouse where they had been stored, to acquire thereby their knowledge of the facts recited in their affidavits, and thus "to accomplish by indirection that which could not be done directly" (*ibid.*). However, this version of the facts leading up to the examination at the warehouse and the subsequent issuance of the warrant and the charge of collusion are completely refuted by the record; petitioner's contention is, therefore, wholly without merit.

In the first place, the record flatly contradicts petitioner's assertion that the parts were "placed in friendly hands at the initiative of the Government." The unchallenged statement of the Ford company attorney was that he was requested by his client to communicate with the Federal Bureau of Investigation for further information in connection with thefts of automobile parts from the Ford plant at Dearborn, and that, in accordance with this request, he called on the Bureau at its New York office (*supra,* pp. 5–6). There is nothing whatever in the record to warrant the statement that the agents of the Bureau or any Government agent volunteered unsolicited information to the Ford company or its attorney.

Secondly, the record does not support petitioner's implied assertion[4] that the Bureau supplied the Ford attorney with a list of the parts which had been seized from petitioner's premises and ordered returned. Rather, the record shows that the Bureau informed him that it had succeeded in tracing some of the property stolen from the Ford company to petitioner and furnished him, apparently at his request, with a list of the articles thus traced (*supra,* p. 6). There is no evidence that those articles were the same as the articles which had been ordered returned to petitioner. Nor is there any evidence that the identical articles returned by the Bureau pursuant to the court order were replevied by the Ford Company.[5]

Finally, the charge of collusion between Assistant United States Attorney Behrens, the Federal Bureau of Investigation, and the Ford attorney is entirely unfounded. There is nothing in the record to show that Mr. Behrens even knew of the conference between the Ford attorney and the agents of the Bureau on March 31, 1942. Moreover, Mr.

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[4] In the language of the petition (Pet. 10), "The Federal Bureau of Investigation * * * before the date set for the return of this illegally seized evidence supplied that information to the attorney for the Ford Motor Company * * *."

[5] Though the writ of replevin was served by the Deputy Sheriff on April 2, 1942, the date the seized property was returned by the Bureau, the property taken under the writ was not delivered to the warehouse until the following day (R. 62).

Behrens stated that at the time the Bureau returned the property to petitioner on April 2, 1942, he "dismissed the matter from his mind," had no intention of seeking a search warrant, and "was prepared to close the matter in the files" (R. 64). In fact, he first learned of the replevin action from petitioner's own attorney, Mr. Kaufman (R. 62).

Silverthorne Lumber Co. v. *United States,* 251 U. S. 385, which petitioner contends (Pet. 8, 10) requires reversal of the judgment below, is clearly distinguishable from the instant case. In that case, while Silverthorne and his father were being held in custody under an indictment returned against them, Government agents, without authority, went to the office of their company, made a "clean sweep" of all books, papers, and documents found there, and took them to the office of the United States Attorney. Application was made to the district court for the return of the seized papers. It was opposed by the United States Attorney "so far as he had found evidence against" Silverthorne and the company, and it was stated that the papers were before the grand jury. Photographs and copies of material papers were made, and a new indictment was returned, based upon the knowledge acquired by means of the search and seizure. The district court ordered that the original papers be returned, but impounded the photographs and copies. Subpoenas to produce the originals were then served, but Silverthorne and the company re-

fused to comply, for which they were held in contempt of court. This Court, in reversing the judgment, held (pp. 391–392) that the Government could not avail itself of the knowledge thus unlawfully obtained; that "The essence of a provision [the search and seizure clause of the Fourth Amendment] forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."

Here, however, it is evident that the proof adduced in support of the application for the search warrant derived from sources wholly independent of the prior illegal seizure. Neither the United States Attorney nor his assistant, Mr. Behrens, was a party to that seizure; it was carried out by agents of the Federal Bureau of Investigation, acting under the authority of a court order issued in another judicial district and subsequently held invalid. In the proceedings for the return of property taken in seizures made pursuant to that order the United States Attorney did not seek to uphold its validity, but merely took the position that, since he was not a party to the seizures, knew nothing about them at the time, and did not have possession or control of the property, he should not be required to see that it was returned (see R. 60-61, 62; *Weinberg* v. *United States,* 126 F. (2d) 1004, 1007, 1008 (C. C. A. 2)). In the *Weinberg* case, however, the circuit court of appeals held that

the United States Attorney "should see to it that the property is made available to him for return to the owners" (126 F. (2d), at 1008). Pursuant to this mandate, he requested the Federal Bureau of Investigation to return the property to petitioner and the Bureau did so (R. 61, 62).

Six days later Mr. Behrens first gave consideration to the matter of obtaining a search warrant in connection with property suspected of having been stolen from the Ford Motor Company and thereafter transported in interstate commerce. By questioning witnesses he satisfied himself that certain stolen property had been shipped in commerce to petitioner. Learning from petitioner's attorney of the replevin action, he asked for and obtained permission from the Sheriff of New York County to examine the replevied goods at the warehouse. This examination convinced him that these goods had been stolen from the Ford company and shipped to petitioner. On the basis of this knowledge and the facts stated in the affidavits of the various witnesses he had examined, he applied for and obtained the warrant. (R. 44–45, 64–65.) Mr. Behrens stated, moreover, that the office of the United States Attorney had nothing whatever to do with the original seizure, that for this reason he "never asked for or received the details with reference to the property seized" and never saw the property at the time it was taken or when it was returned, and that the extent of the "knowledge"

he received as a result of the seizure was "pure hearsay, obtained from affidavits submitted by various petitioners who sought the return of the property, statements made by their respective counsel and statements made by Agents of the Federal Bureau of Investigation" (R. 64). The extent of Mr. Behrens' "knowledge" from these sources was merely that agents of the Bureau, acting under an order of the District Court for the Eastern District of Michigan, had seized certain merchandise which various individuals and corporations, including petitioner, claimed was their property, that the seizures were in connection with a case pending in the Eastern District of Michigan involving thefts of automobile parts from the Ford Motor Company, that the seizures involved parts alleged to be the property of the Ford company, and that the parts so seized were sent to Michigan and were subsequently returned to various parties, including petitioner (R. 63). Mr. Behrens "never knew exactly what the description of the parts was except generally that they might be called replacement parts" (R. 63–64).

In the light of all these circumstances, we think it is clear that the knowledge of the facts which were the basis for the issuance of the warrant cannot be traced to the original unlawful seizure, and that this knowledge was acquired as the result of an independent investigation within the meaning

of this Court's language in the *Silverthorne* case (251 U. S., at 392):

> Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others * * *.[6]

The sole circumstance to which petitioner can point to lend plausibility to its claim that the examination of the parts at the warehouse was made possible by facts learned as a result of the original unlawful seizure, is the fact that the Federal Bureau of Investigation furnished the Ford company attorney a list of articles which the Bureau had identified as having been stolen from the Ford company and traced to petitioner. As we have pointed out, however, there is no evidence that the articles included in this list were the same as the articles which had been ordered returned to petitioner (*supra*, p. 14). But even if such were the fact, the Bureau's action in giving the list to the Ford attorney would not have been improper. Nothing in the *Silverthorne* case can reasonably be construed to mean that merely because stolen prop-

[6] See also *Nardone* v. *United States*, 308 U. S. 338, 341. And in the *Weinberg* case the court below, after holding that the United States Attorney should see to it that the property was returned, added: "We may add that, of course, nothing said herein will preclude the Attorney from initiating such proper steps for the lawful seizure of property in the premises as he may feel advised to take in the execution of his official duties" (126 F. (2d), at 1008).

erty has been seized under an invalid court order, those in possession of it may not cooperate with the lawful owner of the property in his attempt to recover it by supplying him with a list of the seized articles and thereby enabling the owner to institute civil proceedings for their recovery. Such an interpretation of the statement in the *Silverthorne* opinion that evidence illegally acquired "shall not be used at all" (251 U. S., at 392), would, we submit, be an entirely unwarranted extension of this Court's language. We think it clear from the context in which the statement appears and from the facts with reference to which it was made that the meaning intended was that evidence illegally acquired cannot be used directly or indirectly in connection with a criminal prosecution against the person from whom it was unlawfully seized. And, plainly, the action of the Bureau in supplying the Ford attorney with a list of the seized articles for the purpose of enabling the Ford company to recover its property could not be considered such an unlawful use of criminal evidence. The connection which petitioner attempts to draw between this action of the Bureau and Behrens' and Rimar's examinations of the parts at the warehouse is based upon petitioner's wholly unfounded assumption that there was a collusive arrangement between Behrens, the Bureau, and the Ford attorney whereby the parts originally seized would be replevied by the Ford company immediately after

they were returned to petitioner. The connection, if any, was fortuitous, for, as Behrens stated, he first learned of the Ford company's replevin action from petitioner's attorney and thereafter ascertained the location of the replevied property from the Sheriff of New York County.[7]

CONCLUSION

The case was correctly decided below, and there is involved no conflict of decisions or any question

[7] Petitioner's contention (Pet. 11) that the Behrens and Rimar affidavits, even if otherwise competent, did not state facts showing probable cause and did not particularly describe the property in question, is clearly without merit. The Behrens affidavit described the property as "about 364 cardboard cartons and about 27 wooden boxes" in a pile "about six feet high, eleven feet deep and fifteen feet long," containing "Ford, Lincoln Zephyr and Mercury automobile parts," and identified in the warehouse records as "lot number 179–A" (R. 44). This description was plainly adequate. Cf. *Steele* v. *United States No. 1*, 267 U. S. 498, 504. The alleged failure of the affidavits to show probable cause that the property had been used as the means of committing a felony is based on the fact that not all of the cartons and boxes were examined. Mr. Behrens stated that he selected boxes "at random" and examined them and their contents (R. 44-45). Such spot-checking and sampling, however, was clearly sufficient. Probable cause means reasonable cause, or the showing of sufficient facts to warrant a person of prudence and caution in believing that grounds for the issuance of a warrant exist: *Steele* v. *United States*, *supra*, at 504–505; *Carroll* v. *United States*, 267 U. S. 132, 162. Petitioner's remaining contentions (Pet. 12–17) are based on the assumption that the Behrens and Rimar affidavits were incompetent. Since we have shown, however, that they were in all respects competent and proper, it is unnecessary to discuss these contentions.

requiring further review by this Court. We, therefore, respectfully submit that the petition for a writ of certiorari should be denied.

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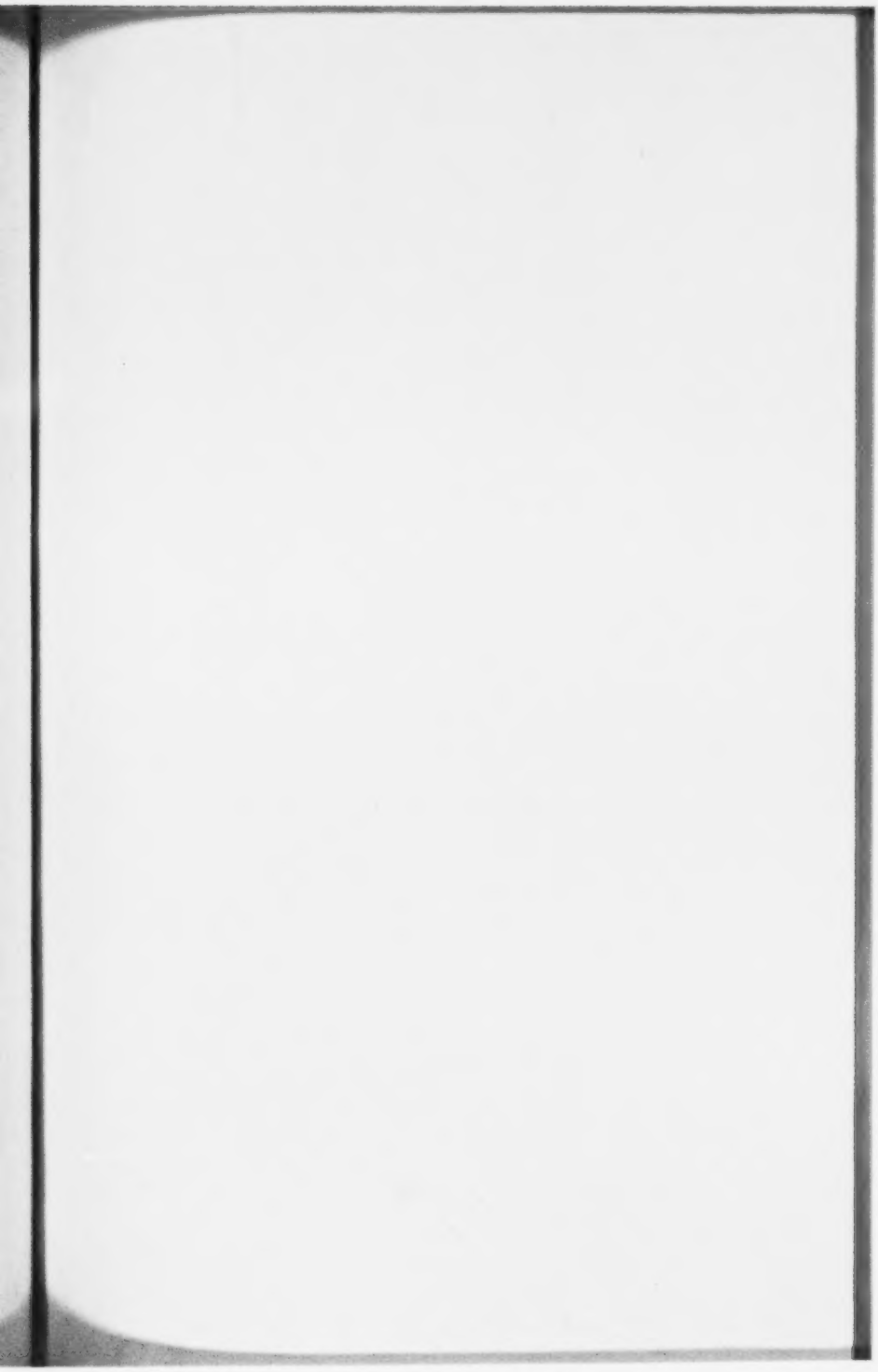

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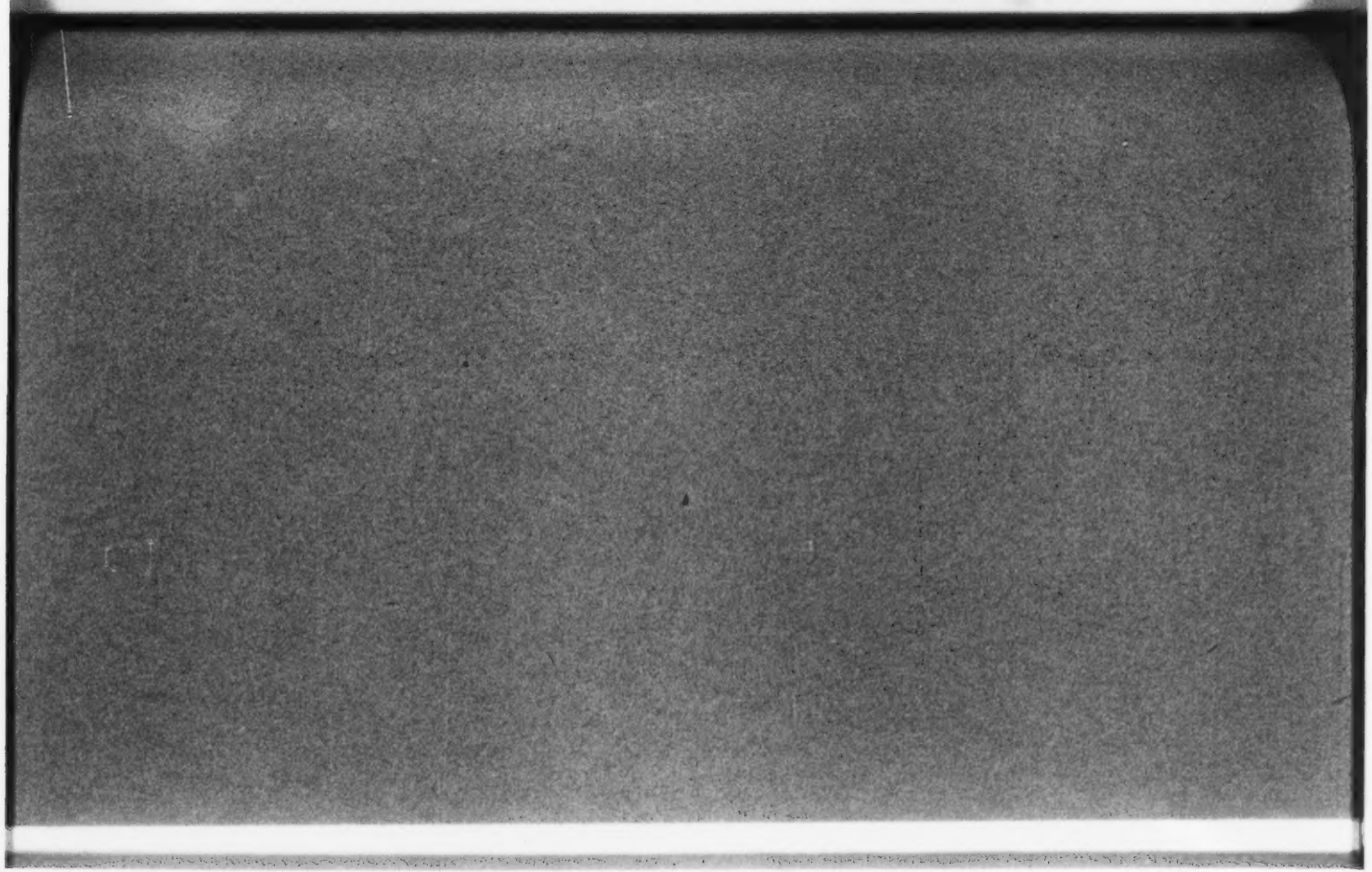
PETITIONER'S REPLY BRIEF

IRVING R. KAUFMAN,
Attorney for Petitioner.



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PETITIONER'S REPLY BRIEF

The petitioner begs the indulgence of THIS COURT in filing a reply to the brief for the respondents. The petitioner feels constrained to do this lest misconceptions arise in the light of respondents' misinterpretation of petitioner's application.

Argument

The petitioner will not undertake to rebut every point raised by the respondents. The petitioner is of the opinion that such procedure would unduly burden THIS COURT, and that the answer to most of the arguments advanced in respondents' brief is found in the Record itself and the

opinion of the Circuit Court. However, petitioner will briefly answer some of the more glaring misinterpretations of the points involved.

The first contention of the respondents (Respondents' Brief 13) is that the information supplied by the Federal Bureau of Investigation to the Ford attorney was at the solicitation of the Ford attorney and not at the initiative of the Government and that therefore this petitioner has made a serious departure from the Record. The petitioner feels that this oversophisticated argument can only find its rationale by abstracting from context certain sentences in the petitioner's application for certiorari. If the phrase (Pet. 10) which respondents challenge is read in context the meaning is quite different from that which respondents attempt to impose upon it. Moreover, even if respondents' contention is correct the essence of the argument remains unaffected. The vice is not in the solicitation, but in *the act of furnishing or using in any way* evidence illegally seized. The respondents' brief therefore seeks to create a straw issue by attempting to justify its act on the ground that the agents did not "volunteer unsolicited" the information furnished to Ford's counsel.

The second contention of respondents (Respondents' Brief 14) is that there is no evidence "that the identical articles returned by the Bureau were replevied by the Ford Company". Once again it must be apparent that there is an attempt by the respondents to create an issue of fact which was not raised in either the District Court or the Circuit Court of Appeals. As a matter of fact the opinions of both the District Court and the Circuit Court of Appeals are based upon the obvious assumption that the articles were the same, and their decisions are based upon the broader principles of law involved herein.

The third argument advanced by the respondents (Respondents' Brief 14) deals with an alleged charge of collusion against the United States Attorney, the Federal Bureau of Investigation and the Ford attorney. Again

the respondents resort to abstraction from context. The paragraph (Pet. 10) in which the alleged accusation is made, refers to "a transparently collusive arrangement". It is submitted that this was intended merely as an indication of the objective character of the transactions and not a condemnation of the subjective intention of the parties involved. It would appear that respondents have attempted to characterize their own act with such an unpleasant label that the fictitious issue of "purity of motive" (which is not at all involved) would be injected. The facts speak for themselves, and it would be naive to say that the result attained by the Government's act in furnishing the information illegally seized, to Ford's counsel was merely coincidental or fortuitous. The respondents sanction the supplying of the information by the Federal Bureau of Investigation to the Ford attorney by saying there is no reason why the Bureau should not give a list of the seized articles to the "lawful owners" (Respondents' Brief 20). There is absolutely no justification for this statement by the respondents since it has not as yet been determined by any Court who is the lawful owner of the property in question. The danger in permitting an agent of the Federal Bureau of Investigation to set himself up as a judicial tribunal and to decide such questions without resorting to a Court of competent jurisdiction is apparent. Not only was the action of the Federal Bureau of Investigation unauthorized but it cannot be justified on any legal or ethical basis. Furthermore, it has been held that there is no justification for the use of illegally seized evidence even in a Federal Civil case, and such use has been barred. *Rogers* v. *United States,* 97 F. (2d) 691.

The most significant omission in respondents' brief is its complete disregard and avoidance of the opinion of the Circuit Court which predicated the validity of the warrant *upon those affidavits which had no possibility of being tainted* as distinguished from the affidavits of Behrens and Rimar. The respondents dsmiss with a footnote (Respond-

ents' Brief 21) the major part of petitioner's application, with the implication that the question of particularity of description, or the lack of foundation for such description in the affidavits, is non-existent. The respondents cite *Steele* v. *United States,* No. 1, 267 U. S. 498, to support their position and overlook completely the distinction indicated in petitioner's brief (Pet. 14) between contraband cases and stolen property cases. *Steele* v. *United States, supra,* and *Carroll* v. *United States,* 267 U. S. 132, cited by the respondents both deal with contraband, in which there is no property right. It is submitted that the distinction made by the Circuit Court of Appeals in *Elrod* v. *Moss,* 278 F. 124, 129 (cited Pet. 14) and the reasons there enunciated for the existence of the distinction, are sufficiently important to merit the attention of THIS COURT and to be sustained.

CONCLUSION

To permit the decisions of the lower courts to stand as authority for the principles of law involved herein would condone and authorize the accomplishment by the Government, through indirection, that which it concededly could not accomplish directly.

It is respectfully submitted that for the foregoing reasons as well as those enunciated in the petition herein, the application for a Writ of Certiorari should be granted.

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